Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-194

In the Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT LOUISE SHEARER

William T. Cannon, Esquire
Suite 1500, Robinson Building
42 South 15th Street
Philadelphia, PA 19102
(215) 564-4448

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by a fellow serviceman, while both were off duty and off the military reservation in another state off base, may sue the government for damages under the Federal Tort Claims Act, notwithstanding the intentional tort exception, where military personnel are on notice concerning the offending serviceman's dangerous propensities and were negligent in failing to remove him from the military, supervise his activities, or warn persons in the position of plaintiff's decedent of his propensities.

2. Whether such a suit, alleging that negligence on the part of the serviceman's superior officers and Department of the Army civilians caused the death of plaintiff's decedent, is precluded by the doctrine of *Feres v. United States,* 340 U.S. 135 (1950), which bars suits by servicemen for torts incident to military service.

TABLE OF CONTENTS

	Pages
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT:	
A. The Intentional Tort Exception To The Federal Tort Claims Act Does Not Bar Respondent's Claim	8
B. Respondent's Claim Is Not Barred By The Feres Doctrine	23
CONCLUSION	39

TABLE OF AUTHORITIES

CASES:

Abdallah v. Caribbean Security Agency, 557 F.2d 61	15
Anderson v. John L. Hayes Construction Company, 243 N.Y. 140	9
Andrews v. United States, 732 F.2d 366	14
Arrendale v. United States, 469 F. Supp. 883	32
Barnes v. United States, 103 F. Supp. 51	29
Beaucoudray v. United States, 490 F.2d 86	28
Belotte v. Zayre Corporation, 531 F.2d 1100	15
Bergman v. United States, 565 F. Supp. 1353	23

TABLE OF AUTHORITIES—Continued

	Pages
Bergmann v. United States, 526 F. Supp. 443	20
Bonsignore v. City of New York, 683 F.2d 635	15
Bridgford v. United States, 550 F.2d 978	32
Brooks v. United States, 337 U.S. 49	24, 25, 28, 29, 37
Broudy v. United States, 661 F.2d 125	33
Brown v. United States, 739 F.2d 362, petition for cert. pending No. 84-636	35
Bryson v. United States, 463 F. Supp. 980	20, 29, 30, 34, 35
Chappell v. Wallace, — U.S. —, 103 S.Ct. 2362	31, 32, 36
Cooper Stevedoring Company v. Kopke, Inc., 417 U.S. 106	38
Cruz v. United States, 715 F.2d 463	32
Downs v. United States, 522 F.2d 990	34
Doyle v. Exxon Corporation, 592 F.2d 44	15
Everett v. United States, 492 F. Supp. 318	33
Fair v. United States, 234 F.2d 288	19
Federal Housing Administration v. Burr, 309 U.S. 242	9
Feres v. United States, 340 U.S. 135	passim
Gibson v. United States, 457 F.2d 1391	14, 17, 34, 35
Gilligan v. Morgan, 413 U.S. 1	33, 36

TABLE OF AUTHORITIES—Continued

Pages

Hand v. United States, 260 F. Supp. 38 29

Harrison v. Missouri Pacific Railroad Company, 372 U.S. 248 18

Harten v. Coons, 502 F.2d 1363, cert. denied, 420 U.S. 963 ..... 29, 31

Hatzlachh Supply Co. v. United States, 444 U.S. 460 5

Hicks v. United States, 511 F.2d 407 ..... 14, 19

Hinkie v. United States, 715 F.2d 96 24

Hughes v. United States, 662 F.2d 219, aff'g *Hughes v. Sullivan,* 514 F. Supp. 667 22

Hunt v. United States, 636 F.2d 580 24

Indian Towing Company v. United States, 350 U.S. 61 10

Jablonski by Pahls v. United States, 712 F.2d 391 ..... 14, 15, 20

Johnson v. United States, 704 F.2d 1431 ..... 29, 34

Knecht v. United States, 144 F. Supp. 786, aff'd 242 F.2d 929 ..... 29, 30, 36

Kohn v. United States, 680 F.2d 922 ..... 16, 17, 36

Kosak v. United States, — U.S. — 104 S.Ct. 1519 ..... 11, 12

Lillie v. Thompson, 332 U.S. 459 18

Liuzzo v. United States, 508 F. Supp. 923 ..... 20, 23

Loritts v. United States, 489 F. Supp. 1030 ..... 20, 23

Mason v. United States, 568 F.2d 1135 28

TABLE OF AUTHORITIES—Continued

Pages

Miliken v. United States, 439 F. Supp. 290 29

Mills v. Tucker, 499 F.2d 886 ..... 29, 36

Moore v. United States, 249 U.S. 487 9

Muniz v. United States, 305 F.2d 285, aff'd in *United States v. Muniz,* 374 U.S. 150 13

Naisbitt v. United States, 611 F.2d 1350, cert. denied, 449 U.S. 885 22

Panella v. United States, 216 F.2d 622 ..... 9, 16, 23

Parker v. United States, 611 F.2d 1007 ..... 30, 32, 36, 38

Payton v. United States, 679 F.2d 475 19

Peluso v. United States, 474 F.2d 605, cert. denied, 414 U.S. 879 24

Rich v. United States, 144 F. Supp. 791 29

Rodgers v. United States, 397 F.2d 12 ..... 14, 20

Rulli v. United States, 581 F. Supp. 1502 34

Sapp v. United States, 153 F. Supp. 496 29

Scales v. United States, 685 F.2d 970 24

Schwartz v. United States, 230 F. Supp. 536 33

Sosa v. Coleman, 646 F.2d 991 15

Steele v. United States, 463 F. Supp. 321 32

Stencel Aero Engineering Corporation v. United States, 431 U.S. 666 ..... 5, 27, 32, 33, 37

Stephan v. United States, 490 F. Supp. 323 30

Thornwell v. United States, 471 F. Supp. 344 33

Underwood v. United States, 356 F.2d 92 ..... 14, 18

United States v. Brown, 348 U.S. 110 ..... 24, 25, 27, 28, 37

United States v. Michel, 282 U.S. 656 9

TABLE OF AUTHORITIES—Continued

	Pages
United States v. Shaw, 309 U.S. 495	9
United States v. Sherwood, 312 U.S. 584	9
United States v. Shively, 345 F.2d 294, cert. denied, 382 U.S. 883	22
United States v. Standard Oil Company, 332 U.S. 301	37
United States v. Yellow Cab Company, 340 U.S. 543	9
Veillette v. United States, 615 F.2d 505	24
Watkins v. United States, 462 F. Supp. 980, aff'd per curiam, 587 F.2d 279	28
Watt v. United States, 246 F. Supp. 386	28
West v. United States, 729 F.2d 1120	33, 34
White v. United States, 317 F.2d 13	14, 18, 19, 34
Williams v. United States, 435 F.2d 804	32
Wine v. United States, 705 F.2d 366	22
Woodside v. United States, 606 F.2d 141	31
Zoula v. United States, 217 F.2d 81	28, 30

STATUTES:

Federal Tort Claims Act:

28 U.S.C. 1254(1)	2
28 U.S.C. 1346(b)	2, 3, 24, 37
28 U.S.C. 2671 *et seq.*	3
28 U.S.C. 2674	24, 25, 26, 27
28 U.S.C. 2680	2

TABLE OF AUTHORITIES—Continued

	Pages
28 U.S.C. 2680(a)	33
28 U.S.C. 2680(c)	12
28 U.S.C. 2680(h)	passim

MISCELLANEOUS:

Annot., 31 A.L.R. Fed. 146 (1977)	27
Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497 (1976)	12
Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 Rutgers L.Rev. 316 (1954)	24
L. Jayson, *Handling Federal Tort Claims* (1964; Supp. 1979)	27
Myers, *The Feres Doctrine: Has It Treated Remediless Wrongs For Relatives of Service-members?* 44 U. of Pitt. L.Rev. 929 (1983)	26
Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?* 77 Mich. L.Rev. 1099 (1979)	24
Note, *The Effect of the Feres Doctrine On Tort Actions Against the United States By Family Members of Servicemen*, 50 Fordham L.Rev. 1241 (1981-82)	25
Pub.L.No. 93-253, § 2, 88 Stat. 50	12
Restatement of Torts, Second § 448 (1965)	14
Rhodes, *The Feres Doctrine After Twenty-five Years*, 18 A.F.L. Rev. 24 (1976)	24
S. Rep. No. 1400, 79th Cong., 2nd Sess. (1946)	11

No. 84-194

—o—

In the Supreme Court of the United States

October Term, 1984

—o—

UNITED STATES OF AMERICA,

Petitioner,

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

—o—

BRIEF FOR THE RESPONDENT LOUISE SHEARER

—o—

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (Pet. App. 34a-36a) are reported at 729 F.2d 266. The opinion of the district court (Pet. App. 24a-30a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on December 19, 1983. A petition for rehearing was denied on March 7, 1984 (Pet. App. 33a-36a). On June 4, 1984, Justice Brennan extended the time in which to file a petition for a writ of certiorari to August 4, 1984. The petition was filed on August 2, 1984, and was granted on October 29, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of [28 U.S.C. 2671-2680] and § 1346(b) of this title shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and § 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Vernon Shearer, who was stationed at Fort Bliss, Texas. While Shearer was off duty and off the base, he was kidnapped and murdered by another serviceman, Private Andrew Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. Pet. App. 2a-3a; J.A. 5, 7. Heard was convicted of Shearer's murder in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (Pet. App. 22a; J.A. 13).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (J.A. 14):

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other people, in spite of the [government's] knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom were warned of the dangers posed.

Respondent asserted that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German authorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June 1979, several Army Superiors had recommended that Heard be discharged. J.A. 10-11.

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (Pet. App. 24a-32a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. § 2680(h), the intentional tort exception to the FTCA, which provides in part that the government is not liable for "[a]ny claims

arising out of assault [or] battery." See Pet. App. 29a n.4. Instead, the court ruled that respondent's claim is precluded by *Feres v. United States,* 340 U.S. 135 (1950), which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under *Feres,* the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs'" (Pet. App. 26a (citation and emphasis omitted)). The court reasoned that because respondent "allege[d] that the Army was negligent in failing to exert reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*" (*ibid.*). The district court also noted that respondent is entitled to receive veterans' benefits (*id.* at 29a) and explained that "the existence of a no fault compensation scheme" for servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (Pet. App. 28a-29a, citing *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 464-465 (1980)).

3. A divided panel of the court of appeals reversed (Pet. App. 1a-23a). The court of appeals overturned the district court's ruling that *Feres* bars respondent's claim, explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (Pet.

App. 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated * * * benefits of being in the armed services" (*id.* at 7a; emphasis omitted).

The court of appeals also held that the intentional tort exception to the FTCA does not bar respondent's claim. The court noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (Pet. App. 8a). Specifically, the court stated that the intentional tort exception would not preclude the claim of a plaintiff who "allege[d] sufficient facts which, if proven, would demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort" (*ibid.*). The court ruled that respondent's claim satisfied this standard because respondent alleged that the Army knew of Heard's "violent propensities" and that "[n]evertheless, Heard remained in the Army and was treated as a member in good standing * * * [and] enlisted men, including Shearer, were not warned about his violent past or present disposition" (*id.* at 9a).

The court of appeals denied rehearing en banc by a vote of 6-4 (Pet. App. 33a-36a).

—o—

SUMMARY OF ARGUMENT

I. The assault and battery exception to the Federal Tort Claims Act, 28 U.S.C. § 2680 (h), does not bar respondent's claim. Respondent's claim does not arise out of Heard's

killing of Shearer. Respondent's claim is based on the negligence of the government in failing to remove Heard from the Military Service following his conviction for killing a woman while part of the Armed Forces in Germany and in failing to warn other servicemembers of Heard's dangerous propensities.

The Court of Appeals' approach does not thwart the purpose of the intentional tort exception to the FTCA since the latter was intended to preclude only respondeat superior liability on the part of the government for intentional torts and not to frustrate the intent of Congress to permit recovery against the Government for negligent and wrongful acts or omissions where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Where the claimant, as here, demonstrates actionable negligence on the part of the government, the Federal District Court has jurisdiction over the case notwithstanding the fact that that negligence proximately and foreseeably culminates in an act of assault and battery. While the assault and battery on Shearer is undeniably part of the damages for which compensation is sought, the essence of respondent's claim is based on negligence. Merely because that negligence culminates in an assault and battery does not bar the claim under the Federal Tort Claims Act.

II. Respondent's claim is not barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). Neither the murder of respondent's decedent nor the negligence of the government which gave rise to the instant claim may be characterized as incident to Shearer's military service. Furthermore, respondent seeks not to second-guess the

decisions of superior officers, but merely the review of the application of policy to the specific failure to remove Heard from the Service. Such a claim poses little, if any, threat to military discipline and to the peculiar and special relationship of servicemembers to their superiors.

ARGUMENT

A. THE INTENTIONAL TORT EXCEPTION TO THE FEDERAL TORT CLAIMS ACT DOES NOT BAR RESPONDENT'S CLAIM.

Respondent's claim, which is based on the military's failure to separate Heard from the active service, its failure to supervise or control the activities of Heard, and its failure to warn others of Heard's propensity for violence, is not barred by the intentional tort exception to the FTCA, 28 U.S.C. § 2680 (h).

While the government correctly quotes the "express words" of the FTCA (Government's Brief at page 8), it ignores the legislative history of the Act, and more importantly, the nature and substance of respondent's claim.

The FTCA was enacted so as to extend a remedy to those who had been without. *Feres v. United States,* supra. It must be kept in mind that:

> . . . The present Tort Claims Act represents 'the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit.' See *Feres v. United States,* 340 U.S. 135 at page 139, 71 S.Ct. 153, at page 156, 95 L.Ed. 152. In construing the language of the Act, we should on the one hand, give full scope to the Government's relinquishment of its historic immunity from suit, and on the other hand, avoid narrowing the provisions which set forth situations in which Congress has seen fit to retain that immunity. Our object should be to read the Act so as to make it 'consistent and equitable'. *Feres,* 340 U.S. at page 139, 71 S.Ct. at page 156, in which we should be untrammeled by any rule of 'strict' or 'liberal' construction. *Panella v. United States,* 216 F.2d 622 (2d Cir. 1954).[1]

In considering the applicability of the assault and battery exception of the FTCA to Respondent's claim, this Court must bear in mind the approach toward FTCA interpretations reflected in *United States v. Yellow Cab Company,* 340 U.S. 543, 554 (1951):

> We think that the congressional attitude in passing the Tort Claims Act is accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Company,* 243 N.Y. 140, 147, 153 N.E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced".

Where a statute contains a clear and sweeping waiver of United States immunity from suit on all negligence

---

[1] *Moore v. United States* 249 U.S. 487 (1919), construing a statute waiving immunity from patent infringement suits, stated in dictum: "The act of Congress must be read 'according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation.'" In the absense of Congressional direction on whether the statute should be strictly or liberally construed, this appears to us the soundest rule, especially since statements that waivers of immunity are to be strictly construed—see *United States v. Sherwood,* 312 U.S. 584, 590 (1941); *United States v. Michel,* 282 U.S. 656, 659, 660 (1931)—are offset by statements that in line with current disfavor of the doctrine of sovereign immunity, at least some such waivers are to be liberally construed—see *United States v. Shaw,* 309 U.S. 495, 501 (1940); *Federal Housing Administration v. Burr,* 309 U.S. 242, 245 (1940).

claims, with certain well-defined exceptions, resort to rules of strict construction cannot be had in order to enlarge the exceptions. The broad and just purpose which the FTCA was designed to effect was to compensate victims of negligence in the conduct of governmental activity in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. *Indian Towing Company v. United States,* 350 U.S. 61 (1955).

The Government's contention that respondent's claim arises out of an assault and battery represents a misapprehension or deliberate distortion of the claim. The respondent's claim is not based on Heard's unprovoked murder of Shearer, but is premised on the military's negligent acts of omission. Specifically, the claim is based on the Military's failure to:

1. separate Heard from the Military Service following his release from custody in Germany after serving a prison sentence for killing a German citizen;

2. control or supervise the activities of Heard following his release from custody so as to prevent yet a second murder; and

3. warn others in the position of respondent's decedent of Heard's proclivities for assaultive behavior.

The intentional tort exception to the FTCA was not intended to defeat such a cause of action. Section 2680 (h) of the FTCA renders Federal District Courts without jurisdiction to consider claims arising out of deliberate torts

such as assault and battery, but not claims based on negligence. S.Rep.No. 1400, 79th Cong., 2d Sess., at 33 (1946).[2]

The Government relies on *Kosak v. United States,* — U.S. —, 104 S.Ct. 1519 (1984), to bolster its interpretation

---

[2] In the hearings before the Committee on the Judiciary, House of Representatives, the following colloquy occurred with respect to this exception:

"MR. ROBSION. On that point of deliberate assault that is where some agent of the Government gets in a fight with some fellow?

MR. SHEA. Yes.

MR. ROBSION. And socks him?

MR. SHEA. That is right.

MR. CRAVENS. Assume a C.C.C. automobile runs into a man and damages him then under the common law, where that still prevails, is not that considered an assault and is not the action based on assault and battery?

MR. SHEA. I should think not. I should think under old common law rather that would be trespass on the case.

MR. CRAVENS. Trespass on the case?

MR. SHEA. Yes.

MR. CRAVENS. I do not remember those things very well, but it seems to me there are some cases predicated on assault and battery even though they were personal injury cases.

MR. SHEA. No: I think under common law pleading you have the same writ, but it makes a distinction between an assault and negligence.

MR. CRAVENS. This refers to a deliberate assault?

MR. SHEA. That is right.

MR. CRAVENS. If he hit someone deliberately?

MR. SHEA. That is right.

MR. CRAVENS. It is not intended to exclude negligent assaults?

MR. SHEA. No. *An injury caused by negligence could be considered under the bill."* (Emphasis supplied.) Hearings on H.R. 5373 and H.R. 6463 Before the House Committee of the Judiciary, 77th Cong., 2nd Sess., ser. 13, at 33, 34 (1942).

of the FTCA (Government's Brief at page 9). *Kosak,* however, is readily distinguishable. In *Kosak* a claim was made for physical damage to property which was in the custody of the Customs Service. The FTCA specifically excepts from liability "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c). Claimant contended that this exception applied only to loss of value occasioned by the wrongful detention of property and not to physical damage to property. This Court rejected this contention holding that the section "sweep[s] within the exception all injuries associated in any way at all with the detention of goods."

Kosak, however, provides no support for the Government's position in this matter. In *Kosak,* the claim was directly based on the loss of or damage to goods in the custody of custom service officials. The claimant sought to interpret the statute so as to create an exception to the exception which, in reality, amounted to a distinction without any difference. Herein, respondent's cause of action does not arise out of Heard's killing of Shearer, but from the Military's negligent failure to rid itself of or to warn of the menace Heard posed to other servicemembers in the position of respondent's decedent.

The Government cannot attempt to take refuge in Congress' 1974 amendment to the FTCA permitting suits for certain intentional torts by law enforcement officers Pub.L.No. 93-253, § 2, 88 Stat. 50 (Government's Brief at page 17). This amendment was aimed at illegal drug enforcement raids carried out by federal narcotics agents. Boger, Gitenstein and Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative An-*

alysis, 54 N.C.L. Rev. 497 (1976). The amendment permitted claims for intentional torts based on a theory of respondeat superior otherwise barred by the intentional tort exception. There is no indication in the history of the amendment that a claim based on the negligent retention or supervision of federal narcotics agents would have otherwise been barred under the unamended FTCA. The amendment was enacted, no doubt, in response to the recurring problem of illegal raids, and the unfairness of requiring, in every instance, a victim to prove negligence before recovery would be permitted. The effect of the amendment is to permit claimants who are victimized by illegal acts of law enforcement officials to base their actions not only in negligence, but respondeat superior as well.

Ironically, the amendment permitting respondeat superior claims provides support for respondent's theory that claims of negligent supervision are not barred by § 2680(h). Only in this one specific situation did Congress see fit to provide a remedy for intentional torts based on vicarious liability. The amendment reflects the concern of Congress over the government's immunity from vicarious liability for intentional torts in the enactment of § 2680(h), and not direct liability for the negligent and wrongful conduct of Government employees. *Muniz v. United States,* 305 F.2d 285 (2d Cir. 1962), aff'd in *United States v. Muniz,* 374 U.S. 150 (1963).

The Government broadly proclaims that: "thus, an allegation of 'negligent supervision' would, under the Court of Appeals' approach, automatically enable any person injured by a government employees' intentional tort to hold the government responsible" (Government's Brief at page

10). This conclusion is only partly correct. To begin with, an FTCA action for negligent supervision has been recognized by the Courts. In *Andrews v. United States,* 732 F.2d 366 (4th Cir. 1984), suit was instituted by a patient as a result of the physician's assistant's use of sexual intercourse as a method of treatment. The Court ruled that the District Court properly exercised jurisdiction over the action as it related to the physician's negligent supervision and failure to provide an adequate treatment program which permitted the physician's assistant to seduce the patient.

Secondly, a mere allegation of negligent supervision, pleaded in conclusory fashion, will never be sufficient to permit recovery against the government. *Gibson v. United States,* 457 F.2d 1391 (3d Cir. 1972). In order to establish a valid claim under the FTCA in this context more than mere conclusory allegations must be made. A party claimant must plead not only the lack of negligent supervision, as well as the Government's advance knowledge of the background of its employee which should have triggered special precautions, but also that its negligence proximately and foreseeably caused the harm.

Finally, and recognizably, the mere fact that an intentional tort is in the background of a claim is not a bar since the Government can be held liable for creating the situation which culminated in the commission of an intentional act.[3] Under the Restatement of Torts, Second, § 448 (1965), Page 480:

---

[3] *Jablonski by Pahls v. United States,* 712 F.2d 391 (9th Cir. 1983); *Gibson v. United States, supra; White v. United States,* 317 F.2d 13 (4th Cir. 1963); *Underwood v. United States,* 356 F.2d 92 (5th Cir. 1966); *Hicks v. United States,* 511 F.2d 407 (D.C. Cir. 1975); *Rodgers v. United States,* 397 F.2d 12 (4th Cir. 1968).

> "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

It is well established that the negligence of a defendant which leads predictably, proximately, and foreseeably to the commission of a criminal act is actionable. *Bonsignore v. City of New York,* 683 F.2d 635 (2d Cir. 1982); *Doyle v. Exxon Corporation,* 592 F.2d 44 (2nd Cir. 1979); *Abdallah v. Caribbean Security Agency,* 557 F.2d 61 (3d Cir. 1977); *Belotte v. Zayre Corporation,* 531 F.2d 1100 (1st Cir. 1976); *Sosa v. Coleman,* 646 F.2d 991 (5th Cir. 1981).

FTCA suits based on claims of negligence, where, as here, that negligence culminated in an act of assault and battery, have been recognized not only by the Third Circuit, but by the Second, Fourth, Fifth, Ninth and District of Columbia Circuits as well.

In *Jablonski by Pahls v. United States,* supra, plaintiff sued under the FTCA for the wrongful death of her mother. The Plaintiff alleged that veterans administration psychiatrists engaged in malpractice by failing to involuntarily commit a man with whom decedent was living and who eventually murdered her. More specifically, plaintiff's suit was based on the psychiatrist's malpractice in failing to record and communicate a police warning concerning the murderer's prior criminal record, a series of

obscene phone calls which he had placed, and damage which he had maliciously perpetrated; failure to obtain medical records concerning the man's previous hospitalization; and the failure to warn the mother concerning the danger posed by the individual. The Court held that the suit was not barred by the assault and battery exception to the FTCA:

> The government attempts to distinguish the decisions holding that the assault and battery exception does not bar suits for negligence. It asserts that each of these cases concerned a plaintiff who was committed to the custody of the government, either as a prisoner or a patient. This distinction is not meaningful. It is more significant that these cases, like the one before us, are based on negligence, not on assault and battery. Moreover, it seems likely that the policy underlying subsection 2680(h) was to insulate the government from liability for acts it was powerless to prevent or which would make defense of a lawsuit unusually difficult. *See Panella v. United States, supra,* 216 F.2d at 625-26. Meghan's suit is based on the negligence of government employees that could have been prevented by an exercise of due care. We hold that Meghan's suit is not precluded by subsection 2680(h). *Id.* at 395.

In *Kohn v. United States,* 680 F.2d 922 (2d Cir. 1982), an Army private first class was shot to death by a fellow servicemember. An action was instituted by the parents of the deceased servicemember based on the military's:

> a. suppression of information from and release of fraudulent information to the parents;
>
> b. coercing the parents into agreeing to an autopsy in violation of their religious beliefs;
>
> c. negligent advice to the parents that their son died as the result of an accidental shooting;
>
> d. negligent loss and/or destruction of the servicemember's personal effects;

> e. negligent failure to provide an honor guard for the servicemember's burial;
>
> f. wrongful sending of a copy of the servicemember's autopsy report, complete with photographs, to his parent's home.

In permitting the claim the Court held that it was not barred by § 2680(h) since the alleged wrongful acts were completely independent of the intentional misconduct which led to the servicemember's death. Though not a case in which an intentional tort was held not to be the superseding cause of injury, but the proximate and foreseeable consequence of the negligence, *Kohn* is a case where recovery was permitted notwithstanding the catalyst of an act of assault and battery on the plaintiff's decedent by a fellow servicemember.

In *Gibson v. U.S.,* supra, a corporate employee, who had been hired to train Job Corps enrollees, one of whom was a juvenile delinquent with a known addiction to narcotics, assaulted the plaintiff while he was engaged in the performance of his duties. In plaintiff's complaint he alleged that the injury arose out of the basic negligence of the United States in that the attack was the foreseeable consequence of the original misconduct. The Court ruled that the matter did not fall within the intentional tort exception of the FTCA and stated:

> . . . [T]he attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care under the circumstances and, therefore, it is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.
>
> Here the very risk which constitutes the defendant's negligence is the probability of such action. It is clear

that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.

Under the appellant's allegations, the injury arose out of the basic negligence of the United States and the attack was the foreseeable consequence of the original misconduct. "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. *Breach of that duty would be negligence.* . . ." (Emphasis supplied.) Lillie v. Thompson, 332 U.S. 459, 462 (1947); Harrison v. Missouri Pacific R. Co., 372 U.S. 248 (1962). Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence.

In *White v. United States,* supra, a veteran at a hospital allegedly committed suicide. Suit was brought for wrongful death, alleging that the hospital had been negligent by allowing him to roam freely rather than confining him more closely. Plaintiff claimed that the decedent's medical files contained a history of suicidal tendencies, and that if the doctors had consulted those files, they would have restricted the decased's movement to a much greater extent. The Court ruled that the District Court had properly exercised jurisdiction over the claim.

In *Underwood v. United States,* supra, a member of the Air Force who had received care at the base psychiatric clinic, shot and killed his former wife. In a subsequent suit for damages, plaintiff claimed that the United States was negligent in allowing the patient to obtain a gun, arguing that the patient's return to duty should have

been subject to the restriction that he not be allowed to receive weapons. 356 F.2d at 94. As in *White v. United States,* supra, the essence of the complaint was that the doctors had been negligent in making a decision based on incomplete knowledge of the facts pertaining to the patient. The decedent had informed military personnel that her husband had threatened her, and this information was provided to one of the doctors treating the patient. However, a second doctor, who assumed responsibility for the patient, and who ultimately ordered his release, was never apprised of the threats. Again, the Court ruled that the District Court has properly exercised jurisdiction over the claim.

In *Payton v. United States,* 679 F.2d 475 (5th Cir. 1982), the Plaintiff's decedent was murdered by a federal prisoner who had been released on parole. The Court ruled that § 2680(h) did not bar the action which was based on the United States Bureau of Prison's failure to supply the United States Parole Board with records showing that the federal prisoner was a dangerous psychotic and a menace to society.

In *Fair v. United States,* 234 F.2d 288 (5th Cir. 1956), the tortfeasor was in the service. He was an Air Force Captain with known homicidal tendencies. He was also a patient in a government psychiatric hospital. He shot and killed a student nurse whom he had previously threatened. The action against the government claimed that he had been released from the hospital with knowledge of his propensities. The Court found that the District Court had properly exercised jurisdiction over the claim.

In *Hicks v. United States,* supra, liability was imposed on a government hospital when it failed to inform a court

of the actual condition of a patient it intended to release. The patient, after being released, shot and killed his wife, an act termed foreseeable.

In *Rodgers v. United States,* supra, plaintiff, a probationer, was subjected to torture by a man of unsavory reputation to whom he was exposed at night during a period in which a marshal was ordered by the Court to provide plaintiff with transportation to his home. The Court ruled that 28 U.S.C. § 2680(h) was inapplicable: "If there was a valid claim here, it is founded on negligence even though assault and or false imprisonment may be collaterally involved."[4]

Any attempt to distinguish these cases based on the fact that the tortfeasor therein was committed to the custody of the government as a prisoner or a patient and thus the government assumed a special duty to protect him and/or supervise his activities (Government's Brief at page 24) must fail. Such a distinction is not meaningful since the actions are based, as in the instant case, on negligence, not vicarious liability. *Jablonski by Pahls,* supra, at 395

---

[4] See also *Bergmann v. United States,* 526 F. Supp. 443 (E.D. Mo. 1981) (claim based on government's negligence in placing participant in a witness protection program without taking measures to prevent him from engaging in criminal activities which resulted in the murder of a police officer allowed); *Liuzzo v. United States,* 508 F.Supp. 923 (E.D. Mich. 1981) (Claim based on the negligent hiring, training and supervision of an F.B.I. informant which eventually led to the murder of a civil rights worker allowed); *Loritts v. United States,* 489 F.Supp. 1030 (D.C. Mass. 1980) (claim brought by a member of a female choral group who was raped by a West Point Academy Cadet while walking on the campus permitted); *Bryson v. United States,* 463 F.Supp. 908 (E.D. Pa. 1978) (claim based on the military's failure to remove a servicemember who eventually murdered decedent who was trying to remove the servicemember from an Army barracks men's room).

("Moreover, it seems likely that the policy underlying subsection 2680(h) was to insulate the government from liability for acts it was powerless to prevent or which would make defense of a lawsuit unusually difficult"). The Government *is* powerless to prevent intentional torts by its employees and the defense of such cases, if allowed, *would* be difficult. The essence of those Circuit Court holdings which have permitted recovery against the Government for negligent acts or omissions predictably and proximately linked to a criminal act is that but for that primary and preventable negligence the intentional tortfeasor would never have been provided with an opportunity to injure, maim, or kill, and that to deny recovery would be to provide the Government with no incentive at all to cure its negligent acts.

Similarly, the Government's attempted distinction between assaults committed by government employees versus non-government employees (Government's Brief at page 22) must also fail. In this case the essence of plaintiff's claim is that it was the negligence of the government's employees which proximately resulted in Shearer's death. The essence of plaintiff's claim is not changed merely because the foreseeable assault is committed by a government employee instead of a third party. The Government has waived sovereign immunity for its employees' negligent acts. Admittedly, it has retained sovereign immunity for its employees' intentional torts. But the Government cannot vest the District Court with jurisdiction over the former and assert that it is powerless to deal with the latter where that intentional tort is but the natural consequence of its own negligent misadventure. Unless some other reasons exist for treating negligence claims against the Government differently depending on who committed

the assault, the identity of the intentional tortfeasor may not be considered controlling.

The authorities relied upon the Government, *Wine v. United States,* 705 F.2d 366 (10th Cir. 1983); *Naisbitt v. United States,* 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980); *United States v. Shively,* 345 F.2d 294, 297 (5th Cir.), cert. denied, 382 U.S. 883 (1965); *Hughes v. United States,* 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes v. Sullivan,* 514 F.Supp. 667 (E.D. VA. 1980) are readily distinguishable. In these cases, plaintiff's claim suffered from three fatal defects. First, the causes of action were directly based on the commission of a deliberate assault and battery and only through conclusory allegations and artful pleading were the litigants able to couch their causes of action in terms of negligence. All are classic, traditional assault and battery actions except for the disingenuous assertion that the Government knew or should have known that the employee had malicious propensities.

Such a conclusory statement, however, is based upon the very assault for which the action is brought. In this case, we are concerned with a servicemember, Heard, who had already committed one brutal homicide, had served time for that crime, and had been recommended for immediate separation from the service as a result of his dangerous propensities. Being fully aware of Heard's violent propensities, the government was under an obligation to take the necessary steps to protect others so that Heard would not kill or injure a second individual. More specifically, the government was under an obligation to see to it that a situation similar to the one which is the basis for this action did not occur.

Secondly, there was, in those cases upon which the government relies, an insufficient factual basis upon which the claimant contended that the Government knew or should have known either of the prior violent action by the assailant or of the assailant's potential violence.

Finally, the Government had not taken any initial steps to remove the employee from its employ. Clearly the causes of action in these cases were directly based on the commission of an intentional tort rather than on the negligence of Government employees separate and apart from intentional and tortious behavior.[5]

B. RESPONDENT'S CLAIM IS NOT BARRED BY THE FERES DOCTRINE.

The FTCA permits a civil action against the United States,

> for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omis-

---

[5] See *Panella,* supra (In this case, . . . , a negligence action is not merely an alternative form of remedy for assault but negligence is rather the essence of plaintiff's claim."); *Liuzzo,* supra ("The mere fact that the injury suffered is directly attributable to an assault or battery does not automatically bar a suit against the Government (citation omitted) . . . It is worthy of emphasis that plaintiffs are not attempting to characterize the actual battery in this case as one negligently performed. Rather, the conduct alleged to have been negligently or wrongfully committed is conduct apart from the murder but which is alleged to have proximately caused the murder".); *Loritts,* supra ("The tort did not arise out of the assault and battery. It had its roots in the Government's negligence".); *Bergman v. United States,* 565 F.Supp. 1353 (W.D. Mich. 1983) ("while plaintiff suffered injury in the nature of an assault, the government's negligence lies in its failure to intercede to protect plaintiff's right to interstate travel and equal protection of the law".)

> sion of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §§ 1346 (b), 2674.

Although no section of the Act specifically excludes all actions by members of the Military, in a series of decisions now referred to as the *Feres* doctrine, this Court defined an exception to the Act and held that no action lies for injury to a member of the Armed forces whose activity at the time of the injury is "incident to military service". *United States v. Brown,* 348 U.S. 110 (1954); *Feres, supra; Brooks v. United States,* 337 U.S. 49 (1948).[6]

In *Feres,* this Court reasoned that no private person could conscript an army, and therefore the Government could not be liable "to the same extent as a private indi-

---

[6] The Feres doctrine, contrary to the Government's implicit suggestion (Government's Brief at page 26, footnote 7), is not without its critics. In fact, it has been subjected to widespread if not universal criticism. *Hinkie v. United States,* 715 F.2d 96, 97 (3d Cir. 1983) ("Here we are forced once again to decide a case where 'we sense the injustice of the result' "); *Scales v. United States,* 685 F.2d 970, 974 (5th Cir. 1982) (applying *Feres* "reluctantly" and "regret[ting] the effects" of the conclusion); *Hunt v. United States,* 636 F.2d 580, 589 (D.C.Cir. 1980) ("the *Feres* doctrine clearly lives, although its theoretical bases remain subject to serious doubt"); *Veillette v. United States,* 615 F.2d 505, 506 (9th Cir. 1980) (applying *Feres* "reluctantly"); *Peluso v. United States,* 474 F.2d 605, 606 (3d Cir.), *cert. denied,* 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973) ("If the matter were open to us we would be responsive to the appellants' argument that *Feres* should be reconsidered * * *"); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L.Rev. 316 (1954); Rhodes, The *Feres* Doctrine After Twenty-Five Years, 18 A.F.L.Rev. 24 (1976); Note, From *Feres* to *Stencel:* Should Military Personnel Have Access to FTCA Recovery?, 77 Mich.L.Rev. 1099 (1979).

vidual." See 28 U.S.C. § 2674 (1976). This Court stated that because the FTCA would subject soldiers to the notorious divergencies in state laws, because it would interfere with the "distinctively federal character" of the relation between soldiers and superiors, and because Congress failed to provide for adjustment between the FTCA and veterans benefits acts, an implied exception to the FTCA for activities "incident to military service" was warranted.

With *Brooks* and *Feres* this Court began drawing the "incident to service" line which determines whether injuries are compensable under the FTCA. In *United States v. Brown,* supra, this Court confirmed that *Feres* had not overruled *Brooks.* In *Brown,* a veteran was allowed to bring a medical malpractice claim under the FTCA. The Court supplied these rationales for the *Feres* doctrine:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.

348 U.S. at 112.

In this case the Government contends that respondent's claim brings into play issues of military discipline and invades the special relationship that exists between soldiers and their superiors.

In Note, *The Effect Of The Feres Doctrine On Tort Actions Against The United States By Family Members Of Servicemen,* 50 Fordham L.Rev. 1241, 1264, 1265 (1981-1982) it was said:

Courts should similarly recognize that when members of a serviceman's family bring suit, the effect, if any, on military discipline is insignificant. The spouse and children of a soldier are civilians, they are neither parties to the special relationship that exists between the soldier and his superiors nor are they subject to military orders. For them to assert in a public forum that military officers were negligent is less offensive to the military's system of discipline than it would be for those subject to make the same charge.

. . .

There will always be some interference with the military function when judicial review is granted. Interference alone, however, is not sufficient to bar the claim. Actions brought by civilians or off-duty servicemen for injuries arising from the alleged negligence of military personnel, but independent of any injury to a serviceman, may involve second guessing military orders or require testimony of military officers. Yet, these actions have never been thought to sufficiently threaten military discipline so as to warrant their dismissal. Because the threat to military discipline is similarly tenuous and remote in suits by family members of servicemen, this factor alone is insufficient to warrant their bar.

Similarly, in Myers, *The Feres Doctrine: Has It Treated Remediless Wrongs For Relatives Of Servicemembers?* 44 U. of Pitt.L.Rev. 929, 952 (1983) it was said:

> Rather, this comment contends that within the framework established by the Supreme Court in those cases for determining if a claim falls within the scope of the § 2674 waiver by Congress, the claims of such persons as the Hinkies, the Lombards and the Monacos were valid and enforceable against the United States under that section. Although the Supreme Court held in those cases that injuries are not compensable under the FTCA when they 'arise out of or are in the course of activity incident to service,' it is contended that this phrase ought not to be read as imposing a 'but for' test for determining whether the plaintiff's injuries arose incident to service: viz., would the plaintiff's injury not have occurred but for the active-duty status of the serviceman? As argued earlier, such a test is not consistent with the primary purpose of the FTCA as stated by the Supreme Court and does not comport with the reasoning of the Court's decisions interpreting that statute. Rather, it is contended that the 'incident to service' phrase ought to be read and applied by the courts to include only those injuries and those activities which were incident to service in the sense that the existence of alternative remedies, the threat to military discipline, or the distinctively federal relationship between the government and the claimant are such that, as held by the Supreme Court in *Feres, Brown* and *Stencel,* the Congress would not have intended to include them within the framework of its waiver of sovereign immunity in § 2674. (Footnotes omitted).

A close and careful analysis of the factors cited in *Feres* and its progeny make it abundantly clear that Respondent's claim is not barred.

A. Relationship Between Servicemember's Activity And Military Service.

District and circuit courts have emphasized various factors in determining whether an injury occurred during some activity "incident to service." See Generally 1 L. Jayson, *Handling Federal Tort Claims,* Ch. 5, § 150-155 (1964 & Supp. 1979); Annot., 31 A.L.R. Fed. 146 (1977). The first question usually asked is what was the duty status of the servicemember. The second concern, especially with vehicular collisions, is where the injury oc-

curred. Contrary to what one might expect, inquiry into what function the servicemember was performing appears to be one of the last questions considered. Upon examining the totality of circumstances, the court determines whether the activity was incident to service.

1. Duty Status

If an individual has been discharged from the service, his activities are normally not "incident to service." See *United States v. Brown,* supra; *Watt v. United States,* 246 F.Supp. 386 (E.D.N.Y. 1965). At the other extreme, one who is on active duty and on duty for the day is acting "incident to service." See *Beaucoudray v. United States,* 490 F.2d 86 (5th Cir. 1974). Between these extremes are degrees of active duty status ranging from furlough or leave to mere release from the day's chores. One on furlough or leave, as in *Brooks,* normally has an FTCA action. One with only an unexercised right to a pass or who is only off duty for the day usually is held to be acting "incident to service." e.g. *Feres,* supra; *Zoula v. United States,* 217 F.2d 81 (5th Cir. 1954) (unexercised right to pass).

At the time of Shearer's murder he was off duty, off the military reservation, and on "authorized leave." He was not acting under the compulsion of orders on duty and he was not on a military mission. His injuries were in no significant way a consequence of his use of benefits or services available to him as a member of the military. His status was beyond equation with those in *Mason* or *Watkins,* in which the plaintiffs were merely off duty for the day. *Mason v. United States,* 568 F.2d 1135 (5th Cir. 1978); *Watkins v. United States,* 462 F.Supp. 980, (S.D.

Ga. 1977), aff'd per curiam, 587 F.2d 279 (5th Cir. 1979). No nexus may be drawn that would allow Shearer's death to be characterized as incident to service. His exercised right to be absent from his duties, his unit, and the military establishment immunizes his claim from the Government's assertion that *Feres* bars relief.[7]

2. Place of Injury

Causes of action by servicemembers under the FTCA have been permitted if the soldier is not on the military reservation at the time or injury or death. *Brooks v. United States,* supra. Respondent's decedent was stationed at Fort Bliss, Texas. He was murdered, however, in Otero County, New Mexico, a location divorced from the military reservation with no nexus to Fort Bliss.

---

[7] *Harten v. Coons,* 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1974) ("[I]f a claimant is on leave or in inactive status at the time and the injury is not the product of a military relationship suit under the [FTCA] may be allowed."); *Mills v. Tucker,* 499 F.2d 886 (9th Cir. 1974) (Suit by servicemember returning to base from furlough not barred by Feres); *Miliken v. United States,* 439 F.Supp. 290 (D.C. Kan. 1976) (Suit by servicemember for beatings by law enforcement officers while servicemember was confined by Military not barred by *Feres*); *Bryson v. United States,* 463 F.Supp. 908 (E.D. Pa. 1978) (suit by servicemember killed in a brawl on a weekend pass or leave not barred by *Feres); Johnson v. United States,* 704 F.2d 1431 (9th Cir. 1983) (Suit by servicemember injured while leaving his job as a bartender at the NCO Club on the base not barred by *Feres).* See also *Knecht v. United States,* 144 F.Supp. 786, 789 (E.D. Pa. 1956), aff'd 242 F.2d 929 (3d Cir. 1957) (pass permitting servicemember to be absent from 5:00 P.M., until 8:00 P.M., the following day); *Barnes v. United States,* 103 F.Supp. 51 (W.D. Ky. 1952) (pass to return home); *Rich v. United States,* 144 F.Supp. 791 (E.D. Pa. 1956) (weekend pass); *Hand v. United States,* 260 F.Supp. 38 (M.D. Ga.) (24-hour pass); *Sapp v. United States,* 153 F.Supp. 496 (W.D. La. 1957) (pass to return home).

3. Activity

A relevant inquiry attaching to all wrongful death claims of servicemembers is what Shearer was doing at the time he was murdered. Shearer was not subject to military control; he was not under the compulsion of military orders; he was not performing any military mission. Nor was he attending to personal affairs, such as shopping or engaging in activities arising from life on the base in the manner of recreational activities. Rather, he was enjoying some free time out of uniform and away from the military setting when he was kidnapped by Heard and driven, against his will, to a location in another state where he was executed. Keeping in mind that "incident" does not mean that a strict "but for" test applies, Shearer should not be considered to have been engaged in activity incident to service. *Parker v. United States.*[8]

4. Incident to Service

As the Court of Appeals appropriately concluded: "Although receiving medical treatment in military hospitals may be considered an activity and benefit incident to military service and therefore barred under Feres, cer-

---

[8] *Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980) (servicemember driving through military on his way home off the reservation on a four day pass); *Zoula v. United States,* supra (Servicemember was attending to personal business during off duty hours); *Stephan v. United States,* 490 F.Supp. 323 (D.C. Mich. 1980) (servicemember injured while attending party on military reservation); *Bryson,* supra (recovery permissible because serviceman was not acting under compulsion of orders or duty and he was not on a military mission); *Knecht v. United States,* 144 F.Supp. 786, 789 (E.D. Pa. 1956) (recovery allowed when serviceman's "activities were not controlled by his military status"), aff'd 242 F.2d 929 (3d Cir. 1957).

tainly being kidnapped off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the Armed services. Thus, there is no legitimate basis on which Feres can bar [Shearer's] claim." 723 F.2d 1106.[9]

B. Maintenance of Discipline

The rationale now apparently regarded by this Court as the main justification for its holding in *Feres* (see *Chappel v. Wallace,* — U.S. —, 103 S.Ct. 2362, 2365 (1983), is the possible harmful effect on military discipline and the effectiveness of allowing suit of the nature involved herein. The critical question is whether the servicemember instantly was performing duties of such a character as to undermine traditional concepts of military discipline if his

---

[9] See *Harten v. Coons,* supra (If a claimant is on leave or inactive status at the time and the injury is not the product of a military relationship suit under the Act may be allowed); *Woodside v. United States,* 606 F.2d at 141, 142 ("Feres requires that there be some proximate relationship between the service member's activities and the Armed Forces . . . [W]here the soldier demonstrates that the activity has no significant link to the Armed Forces and is remote to his military service, suit under the Act has been allowed".); *Camassar v. United States,* 400 F.Supp. 894, 897 (D. Conn. 1975) ("the more realistically critical test of whether Feres should apply is the existence or absence of meaningful causal connection between the injury occurrence and the injured person's military service") aff'd, 531 F.2d 1149 (2d Cir. 1976); *Schwager v. United States,* 279 F.Supp. 262, 263 (E.D. Pa. 1968) (application of Feres depends on the "relevant links" between the military and the servicemember's activity and requires "a measuring of the degree to which the activity is divorced from or related to military service"); *Downes v. United States,* 249 F.Supp. at 628 (Feres should only be applied when the servicemember is "performing duties of such a character" so that a civil suit would "undermine the traditional concepts of military discipline").

estate was permitted to maintain a civil suit for his wrongful death. *Parker v. United States,* supra. More specifically, the focus of the inquiry is whether the servicemember's activities at the time of injury are of a sort that could harm the disciplinary system if litigated in a civil action. *Cruz v. United States,* 715 F.2d 463 (9th Cir. 1983).

As this Court has stated, courts must not allow suits by soldiers to "disrupt[] . . .' [t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to haul his superiors into court. *Stencel Areo Engineering Corporation v. United States,* 431 U.S. 666, 676 (1977) (Marshall, J., dissenting), quoted in *Chappell v. Wallace,* supra.

The mere fact that the judgment of military officers may be questioned in a court of law is not, however, sufficient ground for invocation of Feres, although, it may bring other bars to suit contained in the FTCA into play. Were this not so, civilians could never sue the United States for injuries resulting from military negligence. In such suits, courts grant the civilian's claims without even discussing the effects of the suit on military discipline. *See, e.g., Bridgford v. United States,* 550 F.2d 978 (4th Cir. 1977); *Williams v. United States,* 435 F.2d 804 (1st Cir. 1970); *Arrendale v. United States,* 469 F.Supp. 883 (N.D.Tex. 1979); *Steele v. United States,* 463 F.Supp. 321 (D.Alaska 1978). The fact that an officer might refrain from giving an order to the soldier because a civilian might ultimately sue the United States is so ephemeral and far-fetched that it is given no weight at all in determining the limits of *Feres.*

The rule of law sought by the Government would effectively preclude actions against the government by serv-

icemen and their survivors merely because decision making is called into question. This cannot be what this Court intended in *Feres.* Decisions which are essentially military in nature should never be called into question. *Gilligan v. Morgan,* 413 U.S. 1 (1973). Decisions, however, which are of a kind made by the general public and not characteristically military in nature are open to inquiry as long as its effect on military discipline is minimal. *West v. United States,* 729 F.2d 1120 (7th Cir. 1984).[10] And it is worthy of note that the military discipline factor is not an absolute. The civilian courts may inquire into military actions which have injured civilians even if the Courts might in some degree have to "second guess" military decisions or require members of the armed forces to testify about their decisions and actions. Cf. *Stencel Aero,* supra. The fact that a claim might involve some inquiry into military activities is not, without more, a reason for barring the plaintiff's claims.[11]

---

[10] See also *Broudy v. United States,* 661 F.2d 125, 128-129 (9th Cir. 1981); *Everett v. United States,* 492 F.Supp. 318, 325-326 (S.D. Ohio 1980); *Thornwell v. United States,* 471 F.Supp. 344 (D.C. 1979); *Schwartz v. United States,* 230 F.Supp. 536 (E.D. Pa. 1964), all cases in which the negligence of Armed Services personnel as a predicate for recovery was successfully asserted, involving as they did, minimal, if any, intrusion into military affairs.

[11] There is a fine line between the inquiry into military activities and the discretionary function exception, § 2680(a) of the FTCA, so frequently interposed by the Government in defending FTCA suits. Where the allegedly tortious conduct involves policy considerations or judgment regarding the nature and scope of a regulatory scheme, such conduct is immunized from judicial review by virtue of the discretionary function exception; however, where the allegedly tortious conduct involves the execution, implementation or performance of established policies or procedures, a claim will lie under the

(Continued on following page)

In *West v. United States,* supra, children of a former serviceman were permitted to bring an action against the

---

(Continued from previous page)

FTCA. In this matter, respondent's claim is based on the military's failure to follow established policy. Under such circumstances, respondent's claim cannot be barred. See *Rulli v. United States,* 581 F.Supp. 1502 (1984) (FAA negligently omitted or performed inspection of navigational aids at airport where professional or scientific rather than policy-oriented judgment made at operational and not planning level); *Downs v. United States,* 522 F.2d 990 (6th Cir. 1975) (Government liable for FBI agent's negligent handling of airplane hijacking in that the agent failed to follow well-defined procedures for handling hijackers); *White v. United States,* 317 F.2d 13, 14 (4th Cir. 1963) ("The application . . . of policy to the individual case is an administrative decision at the operational level which if negligently done will make the Government liable . . ."); *Bryson v. United States,* 463 F.Supp. 908 (E.D. Pa. 1978) ("However, to the extent that plaintiff alleges that the specific decision to admit [a serviceman] and/or subsequent failure to remove him constituted negligent conduct by the United States, this court has jurisdiction to consider her complaint); *Gibson v. United States,* supra ("The application of . . . policy to the individual case is an administrative decision at the operational level which if negligently done will make the Government liable . . ."); *Johnson v. United States,* supra ("[Claimant's] activities do not involve the sort of close military judgment calls that the Feres doctrine was designed to insulate from judicial review. See supra at 1439. We are not dealing with a case where the government's negligence occurred because of a decision requiring military expertise or judgment. Rather, the government is negligent precisely because it failed to follow established military rules and procedures governing the operation of the NCO Club"). Respondent does not challenge military decisions of general application or the specific way in which a serviceman's superior officers have discharged their responsibilities to him. (Government's Brief at page 24). Respondent attacks not the formulation of standards to judge the fitness of applicants to the military forces of this country, nor the standards governing the retention of service members in the military, but the specific failure to remove Andrew Heard from active duty using existing procedural remedies available to it duing the almost

(Continued on following page)

Government for birth defects which allegedly occurred as a result of the government's negligent typing of a serviceman's blood at his induction. The Court in permitting the action to proceed stated:

> We believe that the threat to military discipline in this case is minimal. The plaintiffs are not asking the court to inquire into activities which are distinctively military in nature. They are alleging only that government personnel negligently mistyped Stanley's blood. These allegations in no way implicate distinctively military activity; blood typing presumably occurs generally in hospitals and clinics—wherever transfusions can be given. And it is difficult to imagine how an inquiry into the Army's performance of a simple, straight-forward laboratory procedure or perhaps the imprinting of dog tags could threaten the military relationships which are the primary focus of the *Feres* doctrine.
>
> • • •
>
> By contrast, this case involves only an inquiry into a routine medical test which happened to be performed by Army medical personnel. The case seems to present no threat at all to military discipline. There

---

(Continued from previous page)

three years that Heard served in prison for bludgeoning a German woman to death while on active duty in that country, or during the better than four months following Heard's release from prison when he was continued as a member of the active Army before taking Shearer's life. The Eighth Circuit's recent decision in *Brown v. United States,* 739 F.2d 362 (1984), petition for cert. pending No. 84-636, lends no support to the Government's position (Government Brief at page 27 footnote 9). Brown's claims that his supervisors were negligent in failing to prevent the incident of racial assault and in failing to perform a proper investigation of the incident are unlike the claims made by respondent. Brown specifically called into question military authority and policy and not merely the application of military policy to a specific case. *Gibson v. United States,* supra; *Bryson v. United States,* supra.

is nothing of distinctive military character in a test of blood type or the communication of its results. The court will not have to inquire into the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 2445, 37 L.Ed.2d 407 (1973), nor will an inquiry into the blood mistyping undermine the "special nature of military life" or "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel," *Chappell v. Wallace supra,* — U.S. at —, 103 S.Ct. at 2367. See also *Kohn v. U.S.,* supra; *Parker v. U.S.,* supra; *Mills v. Tucker,* supra; *Knecht v. U.S.,* supra.

As stated, respondent's claim focuses on the negligence of the Government in its failure to discharge, supervise, or warn about Heard. Before Shearer had ever enlisted in the Army Heard had been convicted of manslaughter in Germany, had been incarcerated for better than 28 months, and had been the subject of repeated recommendations for involuntary discharge (See J.A. 9-12). Once released from prison Heard performed in an active duty role with the Army first at Ft. Dix, New Jersey, and then at Ft. Bliss, Texas. Negligent failures on the part of the Army to discharge, supervise, or warn about Heard occurred at both United States posts and took place before Shearer was ever assigned, after Heard, to Ft. Bliss. It is straining at best for the Government to attempt, under these circumstances, to characterize either its own negligent acts or Shearer's status when murdered as "incident to service." The "incident to service" test is to be applied to Shearer, not Heard, in deciding if suit is precluded. There is no nexus born of a military relationship between Shearer and either the Government's negligence

in this case or those events that occasioned Shearer's death sufficient to bar the instant claim.

C. Distinctively Federal Character

The "distinctively federal character" of the soldier-Government relation was mentioned in *Feres,* citing *United States v. Standard Oil Company,* 332 U.S. 301 (1947). By this phrase, this court apparently means that a soldier's recovery and the Government's liability should not depend upon the happenstance of where the injury occurs. See *Stencel Aero Engineering Corporation v. United States,* supra. Under the FTCA, the law of the state of the injury governs. 28 U.S.C. § 1346(b)(1976). This court also noted that soldiers have no choice over where the Government sends them. Injured members of the military would be involuntarily subjected to variations in state laws. We learn from *Brooks* and *Brown,* however, that some FTCA suits are possible. Congress had determined that for FTCA suits, uniformity is unnecessary. Furthermore, Congress has not totally left soldiers at the mercy of state tort law; veterans' benefits are available. While the federal character of the relationship may be relevant to the wisdom of adopting an exception for service members, it does not help define when an injury is incurred "incident to service" and should not act to bar respondent's claim in this matter.

D. Veteran's Benefits

In *Stencel Aero Engineering Corporation v. United States,* supra, a national guard pilot was injured when the egress life support system on his military aircraft malfunctioned during a flight. The pilot sued the manufac-

turer of the life-support system and the United States. The manufacturer, Stencel, cross-claimed against the United States for indemnity. This Court dismissed Stencel's cross-claim against the United States on the basis of the Feres doctrine. In so holding, the Court ruled that the Veteran's Benefit Act adequately protected injured servicemen. Said the Court:

> A compensation scheme such as the Veteran's Benefits Act serves a dual purpose; it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in "protective mantle of the Act's limitation-of-liability provisions." See Cooper Stevedoring Company v. Kopke, Inc., 417 U.S. 106 115, 40 L.Ed. 2d 694, 94 S.Ct. 2174 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see Feres, 340 U.S., at 142-143, 95 L.Ed. 152, 71 S.Ct. 153, the military compensation scheme provides an upper limit to liability for the Government *as to service connected injuries* (emphasis added).

Respondent readily concedes that the Veteran's Benefits Act provides an exclusive remedy for suits against the Government by active duty servicemen based on injuries incurred while on duty, *Parker v. United States,* supra (serviceman killed while on leave: "The compensation system does not exclude FTCA remedies, but it is rather the sole remedy once it is determined the injury is *service-connected*") (emphasis added).

Instantly, and as previously set forth, it cannot be accurately asserted that the murder of Vernon Shearer was a "service connected injury", that is, arising out of or in the course of activity incident to service. In *Parker v. United States,* supra, the Court stated:

> The Parker family's receipt of veteran's benefits does not foreclose an FTCA cause of action. Parker had received the right to be off-duty for four days; he was driving a civilian vehicle towards his home off the military reservation; he was not performing any military function. His activities were not "incident to service," and the Government should be liable like any other private person.

Thus, merely because a compensation scheme exists which covers injury or death which is service related, it does not foreclose this action where death was not service related.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM T. CANNON, ESQUIRE
Suite 1500, Robinson Building
42 South 15th Street
Philadelphia, PA 19102
(215) 564-4448

Attorney for Respondent

JANUARY 1985